NOLIANA SULAIMAN

v.

PP

HIGH COURT MALAYA, KUALA LUMPUR
AUGUSTINE PAUL J
[CRIMINAL APPEAL NO: 42-15-98]
13 OCTOBER 2000

EVIDENCE: *Presumption - Statement - Whether may be presumed to be duly taken - Whether presumption in s. 80 of Evidence Act 1950 applies to a s. 112 (Criminal Procedure Code) statement - Effect of such presumption - Who bears burden of rebutting such presumption - Evidence Act 1950, s. 80 - Criminal Procedure Code, s. 112*

EVIDENCE: *Statement - Statement of witness - Voluntariness - Burden of proving voluntariness of such statement - Criminal Procedure Code, ss. 112 & 114*

EVIDENCE: *Documentary evidence - Public document - Copies of - Whether copies certified according to s. 76 of Evidence Act 1950 - Whether admissible - Evidence Act 1950, ss. 65, 76, 77, 79*

EVIDENCE: *Improper admission of evidence - Failure to object - Inadmissible evidence does not become admissible by reason of failure to object - Circumstances in which objection cannot be made at appellate stage*

Two charges were preferred against the accused in the Sessions Court for perjury under s. 193 of the Penal Code. The charges arose from evidence she had given in court ('the notes of proceedings') in a prosecution case against one Haslinda Merican and two statements that she had made to the police under s. 112 of the Criminal Procedure Code ('the s. 112 statements') in respect of that case.

At her trial the s. 112 statements were tendered and marked as exh P4. A certified true copy of part of the notes of proceedings was tendered and marked as exh P3. The accused was found guilty and was convicted and sentenced to a term of imprisonment of one year in respect of each of the charges. The accused appealed against his conviction and sentence arguing against the admissibility of P4 but no objection was raised with regard to P3.

The issues for consideration were: (a) whether it was necessary to ascertain the voluntariness of the s. 112 statements; (b) upon whom the burden of proof lies on the issue of voluntariness when a s. 112 statement is used as evidence in a prosecution for perjury; (c) whether s. 80 of the Evidence Act 1950 applies to a s. 112 statement; (d) whether it was necessary to consider the admissibility of the notes of proceedings although no objections were raised; and (e) whether the notes of proceedings were in fact admissible considering that they were not certified true copies as required by s. 76 of the Evidence Act 1950.

Held:

[1] Reading both ss. 112 and 114 of the Criminal Procedure Code, it is necessary that a s. 112 statement must have been voluntarily made before it can have any value as evidence.

[1a] Statements and confessions are recorded in this country by, apart from magistrates as provided for by s. 115 of the Criminal Procedure Code, police officers under s. 112 of the Criminal Procedure Code in the course of police investigations for the institution of a prosecution, if necessary. A statement or confession recorded by a police officer will therefore come within the meaning of the second part of s. 80 of the Evidence Act 1950 if it can be used as evidence.

[1b] Accordingly, the presumption contained in s. 80 of the Evidence Act 1950 will apply to a s. 112 statement tendered in evidence in court. Since P4 was a police statement, it must be presumed to have been duly made pursuant to s. 80 of the Evidence Act 1950 – which meant that the provisions of s. 112 of the Criminal Procedure Code had been complied with. Since it is a requirement of s. 112 read with s. 114 of the Criminal Procedure Code that a statement made under it is one that is made on the free will of the person making it, it follows therefore that it must be presumed under s. 80 of the Evidence Act 1950 that P4 was so made. The burden therefore was on the accused to show that she did not make P4 voluntarily.

[2] Section 79 of the Evidence Act 1950 raises the presumption that a certified copy is genuine and that the officer by whom it was certified held, when he signed it, the official character which he claims in the document.

[2a] The presumption in s. 79 of the Evidence Act 1950 however is dependent on the document being certified as required by s. 76. The provisions of ss. 65(1)(e) and (f), 65(2) and 77 show that the

requirements of a certificate under s. 76 of the Evidence Act 1950 are mandatory. Accordingly, a copy of a public document will be inadmissible as a certified copy if the certified copy is not in accordance with the stipulated requirements.

[3] Where the mode of proof in respect of a document tendered is irregular or insufficient in the sense that it has been erroneously allowed to be proved in a manner different from which the law requires without objection, such objection cannot be taken at the appellate stage. If such objection had been taken at the trial court the party tendering the document would have had the opportunity to remedy the defect and satisfy the requirements of the law. The rationale underlying the rule is that the failure to object amounts to a waiver of the objection to the admissibility the document.

[3a] However, the requirements of the certificate in a certified copy are not matters that regulate its manner or mode of proof but are necessary and mandatory statutory conditions for it to qualify as a certified copy in the first place. It will thus be inadmissible and a failure to object to such inadmissible evidence will not render it admissible.

[Accused acquitted and discharged.]

Case(s) referred to:

Abdul Ghani Jusoh v. PP [1981] 1 MLJ 25 ***(refd)***
Abdul Rashid & Anor v. PP [1994] 1 SLR 119 ***(refd)***
Allen v. Emmerson [1944] KB 362 ***(refd)***
Anthony Gomez v. Ketua Polis Daerah Kuantan [1977] 2 MLJ 24 ***(refd)***
Arumina Das v. Secretary, Board of Secondary Education AIR [1957] Cal 182 ***(refd)***
Banarsi Devi v. Janki Devi AIR [1959] P 172 ***(refd)***
Beith's Trustees v. Beith [1950] SC 66 ***(refd)***
Bhinka v. Charan Singh AIR [1959] SC 960 ***(foll)***
Boonsom Boonyanit v. Adorna Properties Sdn Bhd [1997] 3 CLJ 17 ***(refd)***
Calcutta National Bank Ltd v. Rangoon Tea Co AIR [1967] Cal 294 ***(refd)***
Cheong Seok Leng v. PP [1988] 2 MLJ 481 ***(refd)***
Chia Cheng Ho & Anor v. PP [1974] 1 MLJ 61 ***(refd)***
Chin Seow Noi & Ors v. PP [1994] 1 SLR 135 ***(foll)***
District Board Kheri v. Abdul Majid Khan AIR [1930] Oudh 434 ***(refd)***
Fauja Singh v. Allah Ditta AIR [1931] Lah 722 ***(not foll)***
Firuz Hazarimal Kutalia v. Income-tax Officer, Ambala AIR [1957] Punj 5 ***(refd)***
Goh Beng Seng v. Dol Dollah [1970] 2 MLJ 95 ***(foll)***
Hari Vishnu v. Ahmad Ishaque AIR [1955] SC 233 ***(refd)***
Harichand v. Bachan Kaur AIR [1971] Punj and Hor 355 ***(not foll)***
Hj Abdul Ghani Ishak v. PP [1980] 2 MLJ 196 ***(refd)***
Hj Abdul Ghani Ishak & Anor v. PP [1981] 2 MLJ 230 ***(refd)***
Husdi v. PP [1974] 2 MLJ 304 ***(refd)***

In re Tan Ah Chuan & Anor [1954] MLJ 135 ***(foll)***
Kalyan Singh v. Smt Chhoti AIR [1973] 263 ***(refd)***
Karpal Singh v. Attorney General, Malaysia [1986] 1 CLJ 332 ***(refd)***
Khadim Ali v. Jagannath AIR [1941] Oudh 77 ***(foll)***
Khong Soon Koy v. PP [1977] 2 MLJ 78 ***(refd)***
Khoo Siew Bee & Anor v. Ketua Polis, Kuala Lumpur [1979] 2 MLJ 49 ***(refd)***
Krishna Kishori v. Kishori Lal 14 [1971] ***(foll)***
Kuruma v. The Queen [1955] AC 167 ***(foll)***
Kurup v. PP [1934] MLJ 17 ***(dist)***
Lee Kong Yin v. PP [1970] 2 MLJ 205 ***(not foll)***
Lee Yuan Kwang & Ors v. PP [1995] 2 SLR 349 ***(refd)***
Lutpi Ibrahim v. Ketua Polis Negara [1998] 5 CLJ 431 ***(foll)***
Mohamed Hanifah v. PP [1956] MLJ 83 ***(foll)***
Mohanlal Ganpatram v. Sayaji Jabilee Co Ltd AIR [1965] Guj 96 ***(refd)***
Nayeb v. R 38 CWN 636 ***(refd)***
Ooi Lean Chai v. PP [1991] 2 CLJ 1304 ***(foll)***
Pittalis v. Grant [1989] QB 605 ***(refd)***
Popatlal v. Visandji [1962] AC 715 ***(refd)***
Promatha Nath Pramanick v. Nirode Chandra Ghose AIR [1940] Cal 187 ***(refd)***
PP v. Abdullah Ambik [1984] 1 CLJ 189 ***(not foll)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 ***(foll)***
PP v. Gan Ah Bee [1975] 2 MLJ 106 ***(foll)***
PP v. Hj Kassim [1971] 2 MLJ 115 ***(foll)***
PP v. Rozmaan Jusoh & Anor [1999] 2 SLR 181 ***(refd)***
PP v. Sanassi [1970] 2 MLJ 198 ***(not foll)***
Ramappa v. Bojjappa AIR [1963] SC 1633 ***(refd)***
Ramli Kechik v. PP [1986] 1 CLJ 309 ***(foll)***
Sajawal v. Emperor AIR [1932] Lah 254 ***(foll)***
Selvadurai v. PP [1948-49] MLJ Supp 43 ***(refd)***
Shangara Singh v. PP [1967] 1 MLJ 15 ***(foll)***
Suppiah v. Ponnampalam [1963] MLJ 202 ***(foll)***
Thatha v. Paru AIR [1986] Ker 196 ***(not foll)***
Toh Kong Joo v. Penguasa Perubatan Hospital Sultanah Aminah, Johore Bahru [1990] 1 CLJ 1001 ***(refd)***
Wong Sang Giap v. Wong Keng Giap [1999] 2 CLJ 618 ***(foll)***

Legislation referred to:

Criminal Procedure Code, ss. 12, 112, 113, 114, 115, 433(2)
Evidence Act 1950, ss. 3(a), (b), 32(1)(i), 58(2), 61, 63(a), 65(1)(e), (f), (2)(c), 68, 76, 77, 79, 80, 113(ii)
Penal Code, s. 193

Criminal Procedure Code [Ind], s. 161
Evidence Act [Ind], ss. 3, 77
Evidence Act [Sing], ss. 3, 82
Penal Code [Ind], s. 193

Other source(s) referred to:
AIR Commentaries: The Code of Criminal Procedure, 1973, vol 2, pp 53, 161
Black's Law Dictionary, 6th edn
Ratanlal & Dhirajlal's Law Crimes, 24th edn, p 826
Sarkar on Evidence, 15th edn, vol 1, pp 48, 98-99, 1205, 1217
Webster's New World Dictionary, 3rd edn

For the appellant - Kuldip Singh (Suresh Thanabalasingam with him); M/s Kuldip & Assoc
For the respondent - Shamsul Sulaiman DPP

Reported by Mariette Peters-Goh

JUDGMENT

Augustine Paul J:

In this case two charges were preferred against one Noliana bte Sulaiman ("the accused") in the Sessions Court at Kuala Lumpur for offences under s. 193 of the Penal Code arising from evidence she had given in court in a prosecution against one Haslinda Merican bte M A Merican and another (Case No 1-62-61-92 and 1-62-69-95) ("the Haslinda case") and two statements that she had made to the police under s. 112 of the Criminal Procedure Code ("s. 12") in respect of that case. Both the statements were recorded from the accused after she was arrested on 27 June 1995 together with some others in respect of an offence under the Women and Girls Protection Act. She testified in the Sessions Court on 6 February 1996 in the Haslinda case. Her evidence in court differed from the statements that she had given to the police. At the subsequent perjury trial against her in the Sessions Court the police statements were tendered and marked as exh. P4. A certified true copy of part of the notes of proceedings of the evidence of the eighth prosecution witness, Noliana bte Sulaiman, in a trial was tendered and marked as exh. P3. The defence objections to the admissibility of these two exhibits were overruled by the learned Sessions Court judge. At the conclusion of the trial the accused was found guilty and convicted. She was sentenced to a term of imprisonment of one year in respect of each of the charges. This appeal is by the accused against the conviction and sentence. Before me the defence argued on the admissibility of exh. P4 but no objection was raised with regard to exh. P3.

The defence challenged the admissibility of exh. P4 before me on the same grounds advanced before the learned Sessions Court judge. The exhibit was tendered in evidence in the Sessions Court by PW3, the inspector who recorded the two statements. The requirements of s. 112 were complied

with in recording them. They were signed by the accused and PW3. When they were tendered in evidence the defence objected to their admissibility on the ground that they must be proved to have been voluntarily made before being admitted in evidence. It was argued that in order to ascertain the voluntariness of the two statements a trial within a trial must be held. The prosecution contended that in view of the differences in the requirements of s. 112 and s. 113 ("s. 113") of the Criminal Procedure Code the question of establishing voluntariness in the case of a statement recorded under s. 112 did not arise. The learned Sessions Court judge dismissed the objection raised by the defence and admitted the two statements.

In my view the objection raised by the defence will arise for consideration only if, in the first place, there is a requirement that a statement recorded under s. 112 must have been voluntarily made. As s. 112 itself does not stipulate such a requirement it would depend on the scope of s. 114 of the Criminal Procedure Code ("s. 114") which must be read with the former. Section 114 reads as follows:

> No police officer or other person shall prevent or discourage by any caution or otherwise any person from making in the course of a police investigation under this chapter any statement which he may be disposed to make of his own free will.

This section says that a person cannot be prevented or discouraged by any caution or otherwise from making a statement which he may be disposed to make of his own free will by a police officer or any other person. This means that a person must be allowed to make a statement of his own free will. The phrase "free will" is defined in *Webster's New World Dictionary* 3rd edn as:

> 1. Freedom of decision or of choice between alternatives. 2(a) the freedom of the will to choose a course of action without external coercion but in accordance with the ideals or moral outlook of the individual.

The word "freedom" is defined in *Black's Law Dictionary* 6th edn as:

> The state of being free; liberty; self-determination; absence of restraint; the opposite of slavery. The power of acting, in the character of a moral personality, according to the dictates of the will, without other check, hindrance, or prohibition than such as may be imposed by just and necessary laws and the duties of social life.

Thus the "free will" of a person to make a statement within the meaning of s. 114 is a reference to one that is made without external coercion like checks, hindrances, prohibition, or restraint. The extent to which a person

may be prevented or discouraged from making a statement of his own free will is determined by the word "otherwise" in the phrase "caution or otherwise" appearing in the section. The word is not *ejusdem generis* to the word "caution". This is because the enactment of a single word before a general expression as in the case of the word "otherwise" in s. 114 makes it impossible to identify a genus so as to narrow down the generality of the expression (see *Haji Abdul Ghani bin Ishak & Anor v. PP* [1981] 2 MLJ 230; *Allen v. Emmerson* [1944] KB 362). Accordingly, the word "otherwise" in s. 114 must be construed widely. The word is defined in *Black's Law Dictionary* 6th edn as:

> In a different manner; in another way, or in other ways.

The use of the word "otherwise" in the section therefore contemplates diverse means by which the free will of a person to make a statement can be prevented or discouraged. It can happen, for example, when a person is discouraged from telling the truth; or is encouraged to tell lies; or is told to tell what he knows in a different way; or is offered inducements; or is oppressed; or is threatened; or is asked improper questions. Section 114 is therefore a statutory prohibition on preventing or discouraging a person from making a statement of his own free will. When it is read with s. 112 the effect is that a statement recorded under the latter must be one that is made on the free will of a person. Any statement made against the free will of a person will deprive it of its voluntary character. In short, therefore, a statement under s. 112 must be one that has been made voluntarily. If it is not voluntarily made it loses its value. Thus as AIR *Commentaries: The Code of Criminal Procedure*, 1973 Vol 2 in commenting on s. 161 of the Indian Criminal Procedure Code, similar to s. 112, says at p. 53:

> The police officer should not extract information by using force; such evidence is useless. The section does not authorise police officers to beat or to confine a person with a view to induce him to make a statement.

I am therefore of the view that a statement recorded under s. 112 must have been voluntarily made before it can have any value as evidence. This is significant in a prosecution for perjury as such a statement will form the foundation of the case. If the police statement was not voluntary it may well be that the testimony given in court is true (see *Nayeb v. R* 38 CWN 636). Thus I am unable to agree with the view expressed in *PP v. Abdullah Ambik* [1984] 1 CLJ 189 that the voluntariness of a police statement in a prosecution for perjury may be relevant only in mitigation of sentence.

That raises the question of the party on whom the burden of proof lies on the issue of voluntariness when a s. 112 statement is used as evidence in a prosecution for perjury. The learned deputy public prosecutor contended that the burden is on the accused. In support of his argument, he relied on s. 80 of the Evidence Act 1950 ("s. 80") which reads as follows:

> Whenever any document is produced before any court purporting to be a record or memorandum of the evidence or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law and purporting to be signed by any Judge, Sessions Court Judge or Magistrate or by any such officer as aforesaid, the court shall presume that –
>
> (a) the document is genuine;
>
> (b) any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true; and
>
> (c) such evidence, statement or confession was duly taken.

In *Kurup v. PP* [1934] MLJ 17 one of the issues that arose for determination by the (then) Court of Appeal was whether a s. 112 statement comes under s. 80. In answer to this Mudie J said at p. 19:

> A further point arises, namely whether the statement is admissible without proof under s. 80 of the Evidence Ordinance. In my opinion it is not, because the statement, before it is admitted by a court, is not evidence, and the police officer is not an officer authorised by law to take evidence. The definition of 'Evidence' and 'Court' in s. 3 of the Evidence Ordinance shows that evidence is the testimony of witnesses in a court or before a person legally authorised to take evidence.
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> It was contended by the learned Deputy Public Prosecutor that the word 'evidence' in s. 80 of the Evidence Ordinance has the same meaning as in section 193 of the Penal Code where the words 'judicial proceeding' are extended by express words to include an investigation directed by law preliminary to a proceeding before a court of justice, and the word 'evidence' has a correspondingly extended meaning. As there is nothing in s. 80 of the Evidence Ordinance to extend the meaning of the word beyond the limits of its definition in s. 3, in my view it does not extend to a statement made to a police officer in the course of a police investigation.

Terrell, Acting CJ said in the same case at p. 18:

> Evidence is defined in the Evidence Ordinance itself (section 3) to include a statement which the court requires to be made before it by witnesses and a statement made before a police officer is certainly not a statement made before a court.

Before commenting on the passages referred to above I find it necessary to reproduce the meaning of the word "evidence" as it now stands in s. 3 of the Evidence Act 1950 ("s. 3"). It reads as follows:

> 'evidence' includes –
>
> (a) all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry: such statements are called oral evidence;
>
> (b) all documents produced for the inspection of the court: such documents are called documentary evidence.

The definition of "evidence" in the Evidence Ordinance in force when Kurup was decided was the same as in s. 3 except that it commenced with the words " 'evidence' means and includes". These words also appear in the definition of "evidence" in s. 3 of the Indian Evidence Act. The words "means and includes" make the definition provided both explanatory and exhaustive. This is in marked contrast to s. 3 which only uses the word "includes" as in s. 3 of the Singapore Evidence Act. In commenting on that section Yong Pung How CJ said in *Chin Seow Noi & Ors v. PP* [1994] 1 SLR 135 at p. 156:

> The use of the single word 'includes' in our s. 3 is clearly intended to make the definition of 'evidence' an extensive one: *Dilworth & Ors v. Commissioner of Stamps* [1899] AC 99, and also *Corporation of Portsmouth v. Smith & Ors* [1883] 13 QBD 184. Within the context of our Evidence Act, 'evidence' may thus be given not just the narrow statutory meaning explicitly spelt out in section 3 itself but also, where applicable, its ordinary, popular and natural meaning. In other words, the scope of admissible evidence as provided for in our Evidence Act is considerably broader than that provided for in the Indian equivalent.

It follows that the meaning of the word "evidence" in s. 3 is not confined to the meaning prescribed therein. It is wider now compared to the time when *Kurup* was decided. The narrow definition of "evidence" following the use of the words "'evidence' means and includes" will have the effect of excluding many matters that should fall within its ambit. Thus not all matters that are proved in court come within the narrow definition of "evidence". As a court decides on matters proved before it such matters must constitute "evidence". Thus a proper meaning of the word "evidence" in the extended sense permitted by the use of the word "includes" can be ascertained by reading it with the meaning of the word "proved" in s. 3 (see *Sarkar on Evidence* 15th edn, vol I, p. 48). The word "proved" is defined in s. 3 as:

> a fact is said to be 'proved' when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

This construction places the meaning of "evidence" in its proper perspective as it is capable of bringing within its sphere many matters which would otherwise fail to qualify. Thus an unsworn statement made by an accused from the dock, being a matter before the court for consideration, will be "evidence" contrary to what has been held in *PP v. Sanassi* [1970] 2 MLJ 198 and *Lee Kong Yin v. PP* [1970] 2 MLJ 205. Similarly the confession of a co-accused is entitled to due consideration like any other evidence that has been proved unlike its treatment in the Indian courts in view of their narrow definition of the word "evidence" (see *Chin Seow Noi & Ors v. PP* [1994] 1 SLR 135; *Abdul Rashid & Anor v. PP* [1994] 1 SLR 119; *Lee Yuan Kwang & Ors v. PP* [1995] 2 SLR 349 and *PP v. Rozmaan bin Jusoh & Anor* [1999] 2 SLR 181).

The passages from *Kurup* that I have reproduced on the treatment of police statements as evidence must now be read in the context of the current law relating to such statements against the background of the extended meaning of the word "evidence". They can now be used as evidence under, *inter alia*, s. 113 and s. 32(1)(i) of the Evidence Act 1950. The words in s. 3(b) as it then stood and as it is now, that is to say, "… documents produced for the inspection of the court …" is a reference to primary evidence. Primary evidence of a document refers to the original of a document to prove its contents if it exists and is obtainable. In 1934 when *Kurup* was decided a s. 112 statement was not admissible in evidence pursuant to s. 113(ii) of the Criminal Procedure Code as it then existed. It was therefore natural for the court to disregard s. 3(b) in *Kurup* in considering whether a police statement constituted 'evidence' as it could not be produced for the inspection of the court in view of the law as it then stood. That prompted the court to consider the status of a police statement as 'evidence' within the meaning of s. 3(a) as it then stood and as it is now. But the law regulating a s. 112 statement has since changed. As such statements can now be used as evidence they come within the meaning of "evidence" in s. 3(b). The basis of the judgment in *Kurup* is therefore incompatible with the present state of the law. It has been held that if the *ratio decidendi* upon which a previous decision has rested has been superseded and invalidated by subsequent legislation or from other like causes, that *ratio decidendi* ceases to be binding (see *Beith's Trustees v. Beith* [1950] SC 66; *Pittalis v. Grant* [1989] QB 605). *Kurup* must therefore be regarded as obsolete and no longer good law.

With that in mind I shall consider whether a s. 112 statement which is recorded by a police officer can now come within s. 80. The section is in two parts. The first part refers to the production before any court of the record or memorandum of the evidence given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence. As this part deals with evidence given in a judicial proceeding the words "… officer authorised by law to take such evidence …" is a reference to any officer authorised by law to record the evidence of a witness in such a proceeding. On the other hand the second part refers to the production before any court of the statement or confession by any prisoner or accused person, taken in accordance with law and purporting to be signed by any judge, Sessions Court judge or magistrate or by any "… such officer as aforesaid". It must be noted that it is sufficient if a person becomes an accused person subsequent to the making of a statement (see *Selvadurai v. PP* [1948-49] MLJ Supp 43; *Khong Soon Koy v. PP* [1977] 2 MLJ 78). This part, unlike the first part, refers to a statement or confession taken for the purpose of a judicial proceeding. There is a difference between evidence given "in" a judicial proceeding and a statement or confession taken "for the purpose" of a judicial proceeding. The former refers to the evidence given in a specific and on-going judicial proceeding while the latter refers to a statement or confession taken which can be used in a judicial proceeding that may be instituted. Thus the first part refers to the notes of evidence recorded in a previous judicial proceeding while the second part would include a statement or confession recorded by a magistrate under s. 115 of the Criminal Procedure Code ("s. 115"). As such statement or confession can be used as evidence it is one that is recorded for the purpose of a judicial proceeding. The reference in the second part to a statement or confession signed by any judge, Sessions Court judge or magistrate is therefore discernible. What, however, requires determination is whether the next category of persons in the second part, that is to say, "… such officer as aforesaid …", in deriving its meaning from the words "… officer authorised by law to take such evidence …" in the first part still contemplate evidence given in a judicial proceeding. If the meaning is to be the same the result will be absurd in view of the different category of records in both parts. It is therefore my view that the words "… officer authorised by law to take such evidence …" in their application to the words "… such officer as aforesaid …" in the second part must be interpreted, in line with the object of that part, to refer to any statement or confession taken from any prisoner or accused person by an officer for the purpose of a judicial proceeding. Statements and confessions are recorded in this country by, apart from magistrates as provided by s. 115, *inter alia,* police officers under s. 112 in the course of a police

investigation for the purpose of the institution of a prosecution, if necessary. A statement or confession recorded by a police officer will therefore come within the meaning of the second part of s. 80 if it can be used as evidence. If it is so it can be said to have been recorded for the purpose of a judicial proceeding. This could not have been possible during the time of *Kurup* as a police statement did not fall within the definition of "evidence" and was not admissible as evidence then. That is also the current position in India. As *Sarkar on Evidence* 15th edn, vol I says at p. 1217:

> Under s. 161 Cr P Code a police officer making an investigation under Ch xii may examine witnesses and take down their statements. But such statements to police are not to be signed by persons making them, nor shall such writing be used as evidence (*Raghuni v. R*, 9 C 455:32 B III) for any purpose except the contradiction of prosecution witnesses as prescribed in s. 162 Cr P Code, though they may in certain cases be used to refresh the memory of the police officer. S. 80 therefore does not apply to statements taken down by police officers during investigation.

As I said earlier a s. 112 statement is now admissible in evidence in this country and will therefore qualify as "evidence" within the meaning of s. 80. As a police officer records a police statement under s. 112 he is an officer authorised by law to record such evidence for the purpose of the second part of s. 80. It is therefore my view that a s. 112 statement comes within s. 80 if it is signed by the officer recording it. *Butterworths' Annotated Statutes of Singapore* in its *5 Evidence Act* 1997 Issue in commenting on s. 82 of the Singapore Evidence Act, similar to our s. 80, says this in the same vein at p. 223:

> Documents purporting to be statements or confessions by any prisoner or accused person taken in accordance with law also attract the presumptions. Here there can be no requirement that the statements must be taken in the course of judicial proceeding since the intention is to cater to documents purporting to be confessions recorded by a magistrate under s. 124 of the Criminal Procedure Code (Cap 68, 1985 Ed), Vol 3: Criminal Procedure and to give them the benefit of the presumptions. A magistrate acting under s. 124 does not act in judicial proceedings. Arguably, it follows that documents purporting to be statements or confessions taken by the police under the provisions of Chapter XIII of the Criminal Procedure Code (Cap 68, 1985 Ed), Vol 3: *Criminal Procedure*, will also attract the presumptions.

Accordingly, the presumptions contained in the section will apply to a police statement tendered in evidence in court. Since exh. P4 is a police statement it must be presumed to have been duly made pursuant to s. 80, that is to say, the provisions of s. 112 have been complied with. It is also a requirement of s. 112, read with s. 114, that a statement made under it is one that is made on the free will of the person making it. It follows

that it must be presumed under s. 80 that exh. P4 was so made. The burden is therefore on the accused to show that she did not make exh. P3 voluntarily.

Learned counsel for the accused then contended that as the admissibility of exh. P4, being police statements, is governed by s. 113 the presumption contained in s. 80 is displaced by the explicit requirements of the former. Section 113 deals with the admissibility of statements made to the police. The section reads as follows:

> 113(1) Where any person is charged with any offence any statement, whether the statement amounts to a confession or not or is oral or in writing, made at any time, whether before or after the person is charged and whether in the course of a police investigation or not and whether or not wholly or partly in answer to questions, by that person to or in the hearing of any police officer of or above the rank of inspector and whether or not interpreted to him by another police officer or other person shall be admissible in evidence at his trial and, if the person charged tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit:
>
> Provided that –
>
> (a) no such statement shall be admissible or used as aforesaid;
>
> (i) if the making of the statement appears to the court to have been caused by any inducement, threat or promise having reference to the charge proceeding from a person is authority and sufficient in the opinion of the court to give the person charged grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him; or
>
> (ii) in the case of a statement made by the person after his arrest, unless the court is satisfied that a caution was administered to him in the following words or words to the like effect:
>
> 'It is my duty to warn that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence'; and
>
> (b) a statement made by any person before there is time to caution him shall not be rendered inadmissible in evidence merely by reason of no such caution having been administered if it has been administered as soon as possible.

A statement recorded under s. 112 will be admissible under s. 113 if it falls within the ambit of the latter section (see *Abdul Ghani bin Jusoh v. PP* [1981] 1 MLJ 25; *Karpal Singh v. Attorney General, Malaysia* [1986] 1 CLJ 332). If the admissibility of exh. P4 comes within s. 113 then the

presumption contained in s. 80 will be displaced and the onus will be on the prosecution to establish that the two statements were voluntarily made. Statements are made admissible under that section as substantive evidence and must be ones that "… if the person charged tenders himself as a witness, any such statement may be used in cross-examination and for the purpose of impeaching his credit". A statement can be used for cross-examination and for the purpose of impeaching the credit of its maker only when it is admitted to show that there is a difference in the evidence given in court and in the statement by that person. This means that s. 113 is designed, *inter alia*, to render a statement admissible in evidence in a trial when its maker has not been contradicted with it yet. It is only after this stage that there is a prosecution for perjury. In such a prosecution the making of a police statement is a fact in issue. It must be proved to have been made so as to establish the fact that it contains matters contrary to what has been said by its maker in a previous trial. The maker is only required to explain the parts of the police statement which contradict what he had said in the trial. In such circumstances the police statement cannot be used to cross-examine the maker and for the purpose of impeaching his credit. Thus in a prosecution for perjury the admissibility of a police statement cannot be governed by s. 113. It follows that the need to establish the voluntariness of exh. P4 as provided by the section does not arise with the result that the burden prescribed in s. 80 is not displaced. I pause to add that even without the aid of s. 80 the burden is on the accused to show that the statements were not voluntarily made as it is an assertion made by her. In support I refer to *Sajawal v. Emperor* AIR [1932] Lah 254 where on a charge under s. 193 of the Indian Penal Code the case proceeded on the basis that it is the defence that must prove the allegation that the statement was extorted. I must add that the accused did in fact lead evidence to show that she did not make the statements voluntarily. However, the learned Sessions Court judge did not accept the evidence. I have no reason to disturb the finding made. It must therefore be taken that the accused made the statements voluntarily.

With regard to exh. P3 no objection was raised by the defence before me as to its admissibility. However, I find it necessary to consider whether it was admitted in evidence in accordance with law. The objection relating to this exhibit raised before the learned Sessions Court judge was that the prosecution had failed to prove that a request was made for it and that the fees in respect of it had been paid as required by s. 76 of the Evidence Act 1950 ("s. 76") which reads as follows:

> Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate, written at the foot of the copy, that it is a true copy of the document or part thereof, as the case may be, and the certificate shall be dated and subscribed by the officer with his name and his official title, and shall be sealed whenever the officer is authorised by law to make use of a seal, and the copies so certified shall be called certified copies.
>
> *Explanation* – Any officer who by the ordinary course of official duty is authorised to deliver the copies shall be deemed to have the custody of the documents within the meaning of this section.

It will be observed that s. 76 is in two parts, that is to say, the entitlement of a person to a copy of a public document and the certification of the copy. The two parts require some consideration in order to determine whether exh. P3 had been rightly admitted in evidence by the learned Sessions Court judge.

(a) The Entitlement Of A Person To A Copy Of A Public Document

This part of s. 76 provides that every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefor. The explanation to the section provides that any person who by the ordinary course of official duty is authorised to deliver the copies shall be deemed to have the custody of the documents within the meaning of the section. The use of the word "demand" means that a person becomes entitled to a certified copy of a public document if he has a right to inspect it. He can then obtain a copy on payment of the legal fees therefor. The right of a person to inspect a public document has been exhaustively dealt with in cases such as *Anthony Gomez v. Ketua Polis Daerah Kuantan* [1977] 2 MLJ 24; *Khoo Siew Bee & Anor v. Ketua Polis, Kuala Lumpur* [1979] 2 MLJ 49; *Haji Abdul Ghani bin Ishak v. PP* [1980] 2 MLJ 196 and *Toh Kong Joo v. Penguasa Perubatan Hospital Sultanah Aminah, Johore Bahru* [1990] 1 CLJ 1001. A certified copy therefore comes into existence only on a demand made by a person who has a right to inspect the original and has paid the legal fees therefor. The necessity for these conditions to be satisfied can be discerned upon a consideration of s. 77 of the Evidence Act 1950 ("s. 77") which deals with the use of certified copies as evidence. Section 77 reads as follows:

> Copies certified in the manner set out in s. 76 may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

This section refers to the copy of a public document that has already been certified. It can be obtained by a person only if he has a right to inspect the original. Section 77 therefore contemplates the use in evidence of a certified copy only of a public document which a person has a right to inspect (see *Husdi v. PP* [1974] 2 MLJ 304). In *Banarsi Devi v. Janki Devi* AIR [1959] P 172 Choudhary J said at p. 173:

> In order that s. 76 of the Evidence Act may be applicable the person who obtains a certified copy of a document must be one who has a right to inspect that document. If, however, that person has no right to inspect that document, a certified copy thereof given to him will not be a certified copy within the meaning of the section and will, therefore, be inadmissible in evidence.

Thus in *Promatha Nath Pramanick v. Nirode Chandra Ghose* AIR [1940] Cal 187 it was held that as an assessee has no right to inspect his income tax assessment order he has no right to demand a certified copy of it under s. 76 and, accordingly, it is not a certified copy under s. 77 which may be produced in proof of the contents of public documents or parts of the public documents of which they purport to be copies. There is no requirement in s. 77 that the legal fees in respect of the certified copy must have been paid before it can be produced in evidence. Even if a certified copy has been obtained without payment of the legal fees therefor it only amounts to a document that has been unlawfully obtained. That will not affect its admissibility. It is trite law that the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained (see *Kuruma v. The Queen* [1955] AC 167; *PP v. Gan Ah Bee* [1975] 2 MLJ 106; *PP v. Haji Kassim* [1971] 2 MLJ 115 and *Ramli bin Kechik v. PP* [1986] 1 CLJ 309). The question of whether the fees have been paid is therefore not a relevant consideration when a certified copy is sought to be adduced in evidence. The corollary is that when the certified copy of a public document is tendered in evidence it is not necessary to show that the legal fees therefor have been paid. It is also unnecessary to lead evidence to show that the person producing it in evidence had a right to inspect it as s. 79 of the Evidence Act 1950 ("s. 79") provides that it shall be presumed to be genuine if it has been duly certified. Needless to say, this presumption is rebuttable (see *Chia Cheng Ho & Anor v. PP* [1974] 1 MLJ 61). I pause to add that the certified copy of a public document can be proved without the need to call a witness to do so (see *Ramappa v. Bojjappa* AIR [1963] SC 1633).

The objection raised by the defence was therefore rightly dismissed by the learned Sessions Court judge. Be that as it may, s. 433(2) of the Criminal Procedure Code provides that no fee shall be payable if an application for a copy of the notes of proceedings of a case is made by the public prosecutor. This provision overrides the requirement of legal fees as provided in s. 76.

(b) The Certification Of The Copy

Copies certified as required by s. 76 are called certified copies and must contain:

(i) a certificate, written at the foot of the copy, that it is a true copy of the document or part thereof, as the case may be;

(ii) the certificate shall be dated;

(iii) the certificate shall be subscribed by the officer with his name and his official title;

(iv) the certificate shall be sealed whenever the officer is authorised by law to make use of a seal.

The need to comply strictly with the statutory requirements of a certificate in a certified copy depends on whether they are mandatory or directory. The distinction between a provision which is mandatory and one which is directory is that while the former must be strictly observed, in the case of the latter it is sufficient that it is substantially complied with (see *Hari Vishnu v. Ahmad Ishaque* AIR [1955] SC 233). Where a mandatory provision is not complied with the act or thing done can have no effect or validity (see *Mohanlal Ganpatram v. Sayaji Jabilee Co Ltd* AIR [1965] Guj 96). Whether a provision is mandatory or directory depends on the intention of the legislature (see *Calcutta National Bank Ltd v. Rangoon Tea Co* AIR [1967] Cal 294). The intention of the legislature must be construed as mandatory if the aim and object of the statute would be clearly defeated if the direction to do a thing in a particular manner is not strictly observed (see *District Board Kheri v. Abdul Majid Khan* AIR [1930] Oudh 434). A mandatory statute is one if it imposes a condition satisfaction whereof is essential to the validity of the act as to which it is imposed and a directory statute is one if it prescribes the formalities which may be disregarded without invalidating the thing to be done (see *Firuz Hazarimal Kutalia v. Income-tax Officer, Ambala* AIR [1957] Punj 5). When a statute uses the word "shall", *prima facie* it is mandatory (see *Cheong Seok Leng v. PP* [1988] 2 MLJ 481). The intention of the legislature must therefore be ascertained not only from the phraseology of the provision but also by a

consideration of its nature, object and the consequences which would follow from construing it one way or the other (see *Arumina Das v. Secretary, Board of Secondary Education* AIR [1957] Cal 182).

Section 76 uses the world "shall" in describing the certificate. It is only a *prima facie* indication that the requirements of the certificate are mandatory. Its true effect depends on the object for which it was enacted. This can be gathered from its concluding words "… the copies so certified shall be called certified copies." This makes it clear that copies not certified as required by s. 76 cannot be called certified copies. In that event they will not have any legal force. Thus in *In re Tan Ah Chuan & Anor* [1954] MLJ 135 it was held that if a certificate is not dated as required by s. 76 then the copy is not a certified copy. This view was adopted in *Mohamed Hanifah v. PP* [1956] MLJ 83. The legal effect of a copy which is not duly certified points towards the requirements of s. 76 being mandatory. The manner of proving a public document by the use of certified copies as provided by s. 77 is a further indication to determine whether the legislature intended the requirements of a certificate to be mandatory or not. The section provides that proof of the contents of public documents "may" be given by certified copies. The use of the word "may" in s. 77 appears to suggest that the production of certified copies is only one of the modes of secondary evidence that may be used to prove a public document. If this view can be sustained then as *Sarkar on Evidence* 15th edn, vol I says at p. 1205:

> If then, a certified copy, should from want of some formality fail as a certified copy, it might still be used in evidence as an examined or sworn copy if it has been examined with the original by any one who can swear to the comparison with the original and to the accuracy of the copy: *Reid v. Margison* [1808] 1 Camp 469 (Norton p. 258).

If this interpretation is correct then the requirements of a certificate will be directory. But as the learned author goes on to say:

> It appears that this interpretation would be not in consonance with the provisions of s. 65(e).

That makes it necessary to refer to s. 65 of the Evidence Act 1950 ("s. 65") the relevant parts of which read as follows:

> (1) Secondary evidence may be given of the existence, condition or contents of a document admissible in evidence in the following cases:
>
> (e) when the original is a public document within the meaning of section 74;

(f) when the original is a document of which a certified copy is permitted by this Act or by any other law in force for the time being in Malaysia to be given in evidence;

(2) (c) In the case referred to in subsection (1)(e) or (f) a certified copy but no other kind of secondary evidence is admissible.

Section 65(1)(e) and (f) read with its subs. 2(c) make it manifestly patent that proof of a public document by secondary evidence is restricted to certified copies and no other kind of secondary evidence. The word "may" in s. 77 is therefore permissive only to the extent that it refers to the option of a party of proving the contents of a public document by a certified copy or by production of the original. It must also be observed that the only category of documents that can be proved by secondary evidence when the original is available are public documents. The certified copy of a public document therefore stands on the same footing as the original. The restriction in the use of only certified copies as secondary evidence is an indication that such copies must be certified as required. It is perhaps for this reason that s. 77 explicitly provides that "Copies certified in the manner set out in s. 76 …" may be produced in proof of the contents of public documents. Once a copy is duly certified, that is to say, certified in accordance with law, then s. 79 raises the presumptions that the certified copy is genuine and that the officer by whom it was certified held, when he signed it, the official character which he claims in the document. The section reads as follows:

(1) The court shall presume to be genuine every document purporting to be a certificate, certified copy or other document which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified by any officer in Malaysia who is duly authorised thereto:

Provided that the document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

(2) The court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character which he claims in the document.

The proviso to the section must be read with caution. If it refers to the sufficiency of substantial compliance with the provisions for the certification of a copy then such requirements will be directory. KT Thomas J was of that view in *Thatha v. Paru* AIR [1986] Ker 196 where his Lordship said at p. 198:

> There is some importance to the proviso to that section which says that it is enough that such document 'is substantially in the form and purports to be executed in the manner directed by law in that behalf'. When the law has created a legal presumption in favour of the genuineness of a document when it is in substantial compliance, though not in strict compliance with the provisions for the certification of a copy, it is an added ground to strengthen the view that a carbon copy as produced in this case can be treated as a certified copy.

With respect I am unable to agree as the judgment has not considered the effect of s. 65(e) and (f) read with s. 77 of the Indian Evidence Act, similar to ours, which restrict proof of public documents by secondary evidence to only certified copies. This, perhaps, led to a mis-reading of the proviso to s. 79. The reference in the proviso to substantial compliance with the form and manner of execution of a document is a reference to the document itself that has been certified and not to the provisions dealing with the certification of a copy. That is the view of the Indian Supreme Court, and with which I agree, in *Bhinka v. Charan Singh* AIR [1959] SC 960 where Subba Rao J said at p. 963:

> Under this section a Court is bound to draw the presumption that a certified copy of a document is genuine and also that the officer signed it in the official character which he claimed in the said document. But such a presumption is permissible only if the certified copy is substantially in the form and purported to be executed in the manner provided by law in that behalf. … To put it differently, if a certified copy was executed substantially in the form and in the manner provided by law, the Court raises a rebuttable presumption in regard to its genuineness.

The presumption relating to a certified copy is therefore dependent on it being certified as required by s. 76. The relevant provisions of the Evidence Act 1950 that I have referred to show that the requirements of a certificate under s. 76 are mandatory. Accordingly, a copy of a public document will be inadmissible as a certified copy if the certificate is not in accordance with the stipulated requirements. This has been held to be so in a plethora of cases. Thus in *Krishna Kishori v. Kishori Lal* 14 1971 where the copy which was produced from the record in a previous proceedings which purported to be an authenticated copy, but not a certified copy as required by s. 76, the document was held inadmissible. In cases such as *In re Tan Ah Chuan & Anor* [1954] MLJ 135; *Mohamed Hanifah v. PP* [1956] MLJ 83 and *Lutpi bin Ibrahim v. Ketua Polis Negara* [1998] 5 CLJ 431 a certified copy without being dated was held to be inadmissible. In *Shangara Singh v. PP* [1967] 1 MLJ 15 the copy was ruled inadmissible because not only was it not signed as a certified copy but it was undated as well. In *Wong Sang Giap v. Wong Keng Giap* [1999] 2 CLJ 618 a copy which

did not carry any certificate or signature as required by s. 76 was held inadmissible. In *Khadim Ali v. Jagannath* AIR [1941] Oudh 77 it was held that where a copy of a public document does not bear a certificate written at the foot of such copy that it is a true copy of such document the copy is inadmissible in evidence.

Exhibit P3 was tendered in evidence through PW1, the registrar, Sessions Court Kuala Lumpur, the successor of the registrar who had certified the exhibit. The learned deputy public prosecutor applied for it to be marked as an exhibit as it had been certified under s. 76. It was duly marked. PW2 was the interpreter in the Haslinda case. He identified the accused as the eighth prosecution witness in that case. He assisted her to take the oath. PW4 was the deputy public prosecutor who conducted the prosecution in the Haslinda case. He also said that the accused was the eighth prosecution witness in that case. When exh. P3 was referred to him he said, "Saya percaya inilah nota keterangan di mahkamah." Exhibit P3 consists of 51 pages. They are photostat copies of the record of evidence of one Noliana bte Sulaiman, the eighth prosecution witness. The certificate of the registrar appears on the top of the first page. It is entitled 'SALINAN DI AKUI SAH". It is followed by the signature, name and designation of the registrar. It is dated. A perusal of the certificate reveals that there are two defects in it. Firstly, the certificate appears at the top of the first page. This is not in compliance with s. 76 as the section requires the certificate to be " … written at the foot of the copy … ." Where a public document consists of more than one page, as in this case, the certificate must appear at the foot of the copy of the last page. The reason for requiring the certificate to be at the foot of the copy is to indicate that what precedes it has been checked with the original to constitute a certified true copy. Secondly, the certificate states "SALINAN DI AKUI SAH". This is not in compliance with s. 76 as the section requires the certificate to state "… that it is a true copy of the document or part thereof … ." This requirement is very significant. It serves the purpose of connecting the certified copy tendered with the matter to which it relates. In cases of this nature there must be evidence to show that the accused is the person who gave the evidence in exh. P3 in the Haslinda case and a mere similarity of name in the charge and the exhibit is certainly not sufficient (see *Kurup v. PP* [1934] MLJ 17). In this regard I refer to *Ratanlal & Dhirajlal's Law Crimes* 24th edn which in commenting on the use of a certified copy in perjury proceedings says at p. 826:

> Where the law requires the evidence to be taken down in writing, a certified copy of the deposition must be placed on the record. The certified copy should also show on the face of it that it is a copy of part of the record in a specified proceeding. The mere production of a certified copy is not sufficient to show that the accused is the person who made the statement.

This requirement may not be pronounced where the certified copy is of the whole document in which event it would be self-explanatory. If the particulars of the original document of which exh. P3 is a copy had been mentioned in the certificate, as required by s. 76, then it would be presumed under s. 79 that exh. P3 is the evidence given by the accused in the Haslinda case. That raises the question of whether the absence of the particulars in the certificate can be supplemented by the oral evidence of PW4 who identified exh. P3 as the notes of evidence of the Haslinda case. As I said earlier a copy of a public document will be inadmissible in evidence as a certified copy if the certificate is not in accordance with the requirements of s. 76. The two defects that I have referred to result in exh. P3 not being a certified copy within the meaning of s. 76. Exhibit P3 is therefore inadmissible in evidence. It follows that the oral evidence of PW4 cannot be used to supplement the defect in exh. P3 lawfully as the exhibit itself is inadmissible. Such evidence would, of course, have been relevant if the exhibit had been the original. However, no objection was raised in the Sessions Court on the admissibility of exh. P3 based on the defects in it that I have identified.

That leads to the critical question of whether failure to object to the admissibility of an improperly certified document when it is tendered in evidence at the trial, like in the case of exh. P3, can be challenged on appeal. In answering this question I shall first refer to *Suppiah v. Ponnampalam* [1963] MLJ 202 where Thomson CJ (as he then was) in referring to s. 68 of the Evidence Act 1950 said at p. 203:

> Now, irrespective of whether that section has any application at all in the case of a charge of land under the Land Code, it was not open to the appellant to raise the point for the first time on appeal. The point was thus dealt with by the Privy Council in the case of *Gopal Das v. Sri Thakurji* AIR [1943] PC 83, 87 in a passage which was quoted by their Lordships in the later case of *Popatlal v. Visandji* [1962] AC 715, 724:
>
> > Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of Appeal and then complain for the first time of the mode of proof.

Thus where the mode of proof in respect of a document tendered is irregular or insufficient in the sense that it has been erroneously allowed to be proved in a manner different from which the law requires without objection such objection cannot be taken at the appellate stage. If such objection had been taken at the trial court the party tendering the document

would have had the opportunity to remedy the defect and satisfy the requirements of the law. The rationale underlying the rule is that the failure to object amounts to a waiver of the objection to the admissibility of the document (see *Popatlal v. Visandji* [1962] AC 715). It amounts to an implied admission of the objection waived. An implied admission amounts to an express admission within the meaning of s. 58 of the Evidence Act 1950 ("s. 58") which reads as follows:

> (1) No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing or which before the hearing they agree to admit by any writing under their hands, or which by any rule of pleadings in force at the time they are deemed to have admitted by their pleadings:
>
> Provided that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.
>
> (2) This section has no application to criminal proceedings.

What must now be considered is whether the rule that I have just adverted to is applicable in the case of the copy of a public document that has been improperly certified. In *Harichand v. Bachan Kaur* AIR [1971] Punj and Hor 355 copies of certain documents which were not certified to be true under s. 76 of the Indian Evidence Act were admitted in evidence without objection. In declining to question their admissibility at the appellate stage the court relied on the judgment of Tapp J in *Fauja Singh v. Allah Ditta* AIR [1931] Lah 722 where his Lordship said at p. 723:

> It is well established that where a fact has been erroneously allowed to be proved in a manner different from which the law requires, and no objection is taken in the court of first instance, such objection cannot be taken later in appeal. This view is based on the principle that if objection is taken at the proper time to the reception of certain evidence (not inadmissible in itself) owing to such evidence not being produced in the form prescribed by law, an opportunity can be afforded to the party producing such evidence to remedy the defect and satisfy the requirements of the law.

In considering the judgment that I have just referred to it must be observed that the rule of waiver applies only when the mode of proof put forward in admitting a document is irregular or insufficient and not when the document itself is inadmissible. The phrase "mode of proof" refers to the procedure by which a particular document is to be proved (see *Boonsom Boonyanit v. Adorna Properties Sdn Bhd* [1997] 3 CLJ 17). The rule can be said to apply to an improperly certified copy if such copy can still be considered as secondary evidence and admissible notwithstanding the defects. Section 61 of the Evidence Act 1950 says that the contents of

documents may be proved either by primary or by secondary evidence and s. 63(a) of the same Act says that secondary evidence includes "certified copies given under the provisions hereinafter contained". Sections 65(1)(e) and (f), 76 and 77 that I have considered earlier show that the only secondary evidence that can be used to prove a public document is a certified copy and that it must be certified as required. The requirements of the certificate in a certified copy are not matters that regulate its manner or mode of proof but necessary and mandatory statutory conditions for it to qualify as a certified copy in the first place. An improperly certified copy therefore does not amount to secondary evidence (see *Kalyan Singh v. Smt Chhoti* AIR [1973] 263). It will thus be inadmissible in evidence. A failure to object to such inadmissible evidence will not render it admissible. I am therefore unable to agree, with respect, with the views expressed in *Harichand v. Bachan Kaur* AIR [1971] Punj and Hor 355 to which I have referred earlier. Be that as it may, the rule of waiver applies only in civil proceedings and s. 58(2) makes it clear that in a criminal proceeding no fact can be proved by admissions. Thus the rule relating to waiver of a right to object to admissibility of evidence does not apply to criminal proceedings. That would be the position even in the absence of a law like s. 58(2). India has no such equivalent. And, as *Sarkar on Evidence* 15th edn, vol 1 says at pp. 98-99:

> Except where the law expressly permits waiver, the rights of an accused should not be held to be lost by his consent to a procedure or to admission of evidence which the law does not authorise. The prisoner on his trial can consent to nothing. It is the duty of the magistrate and all criminal courts to follow the procedure prescribed by law, and the consent of the accused cannot be invoked against irregularity in procedure (*Dy Legal Rem v. Upendra,* 12 CWN 140, folld in *Kottam v. Umar,* 46 M 117). Wide difference exists between a civil suit and a criminal prosecution. Criminal proceedings are bad unless they are conducted in the manner prescribed by law and if they are substantially bad, the defect will not be cured by any waiver or consent of the prisoner (*R v. Bholanath,* 2 C 23, 30). A prisoner on his trial cannot waive his ordinary right, nor can he consent to anything (*Att Genl v. Bertrand,* 36 LJPC 51, 57. See also *R v. Bishonath,* 12 WR Cr 3).

A similar stand was taken by the (then) Supreme Court in *Ooi Lean Chai v. PP* [1991] 2 CLJ 1304 where Mohamed Azmi SCJ said at p. 1307:

> Further a waiver by an accused person could not be held against him in regard to rules of procedure and evidence in criminal proceedings. Any admission of inadmissible evidence, even with consent or by waiver of the accused was wrongful and such inadmissible evidence remained inadmissible evidence, the effect of which was open to any court to assess.

Exhibit P3 therefore remains inadmissible even though there was a failure to object to its admissibility in the Sessions Court. Its admissibility can be challenged on appeal.

However, no objection was also raised before me on the admissibility of exh. P3. That, of course, does not preclude the court from excluding inadmissible evidence on its own motion in the exercise of its ever vigilant duty as the guardian of justice in order to ensure that judicial decisions are made in accordance with law. As I said in *PP v. Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 215 at p. 397:

> If it is the duty of the judge to admit all relevant evidence, it is no less his duty to exclude all irrelevant evidence.

Sharma J said in *Goh Beng Seng v. Dol bin Dollah* [1970] 2 MLJ 95 at p. 97:

> The mere fact, however, that counsel for the defendant in this case did not object to the admissibility of the statements of witnesses made to the police, does not excuse me from excluding such evidence if in fact and law it is not admissible. It is the duty of the court to disallow all inadmissible evidence even though no objection is taken to its admissibility. Inadmissible evidence remains inadmissible. It cannot be rendered admissible by failure of counsel to object to it.

I therefore consider it my duty to rule that exh. P3 was wrongly admitted in evidence. It must therefore remain inadmissible even though no objection was raised as to its admissibility with the result that the foundation of the prosecution case collapses. Without this vital piece of evidence the order of the learned Sessions Court judge in calling upon the accused to enter upon her defence is wrong in law.

In the upshot I acquit and discharge the accused.